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MENTAL RETARDATION AND LEGAL RESPONSIBILITY

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IN 1834, M'Naghten was tried for murder and was acquitted by reason of insanity; subsequently, the House of Lords proposed five questions to a panel of judges in hopes of delimiting the responsibility of the mentally ill. The answers of the judges constitute the *M'Naghten* Rule, the essence of which is: To establish a defense of insanity, it must be proved that the accused party was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong.[1] Much discussion has ensued in the century and a quarter since that time; however, little has been changed and, in most jurisdictions, the *M'Naghten* Rule is still the bench mark.

Virtually all the attention of legal and psychiatric experts has been focused on mental illness and criminal acts, while little or no notice has been given to other aberrations of behavior that may predispose a person to criminal behavior, or vitiate criminal responsibility. The most prevalent of these conditions is mental retardation.

A careful study of prison inmates done by the George Washington University Institute of Law, Psychiatry and Criminology shows that 9.5 per cent of those surveyed had an IQ below seventy. This finding is based on IQ scores from 90,477 prison records. Of these scores, 1.6

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[1] M'Naghten's Case, 8 Eng. Rep. 718 (1843).

per cent fell below fifty-five.[2] No precise figures are available on prevalence of retardation, but it is estimated that at least three per cent of the entire population is affected.[3] This comparison demonstrates that the mentally retarded are over-represented in prison populations. Furthermore, the President's Commission on Law Enforcement reports that the further a person goes in the judicial process (*i.e.*, from arrest to prison), the greater the likelihood that he is retarded.[4]

The American Psychiatric Association has defined mental retardation as "subnormal general intellectual functioning which originates during the developmental period and is associated with impairment of either learning and social adjustment or maturation or both."[5]

Mental retardation is classified into four categories expressed in terms of degree and attendant characteristics:

Profound—Some motor and speech development; may achieve very limited self-care; needs nursing care. IQ: less than twenty.

Severe —Can talk or learn to communicate; may be trained in elemental health habits; may contribute partially to self-maintenance under complete supervision; can develop self-protection skills to a minimal useful level in controlled environment. IQ: twenty to thirty-five.

Moderate—Can profit from training in social and occupational skills; unlikely to progress beyond second grade level in academic subjects; may achieve self-maintenance in unskilled or semi-skilled work under sheltered conditions; needs supervision and guidance when under mild social or economic stress. IQ: thirty-six to fifty-one.

Mild —May learn acadamic skills up to approximately sixth grade level by late teens; can be guided toward social conformity. IQ: fifty-two to sixty-seven.[6]

The "causes" of mental retardation are diverse. They occur early in life and may range from an isolated biological accident to various combinations of social, cultural and psychological factors. Little can be

[2] Brown and Courtless, *The Mentally Retarded in Penal and Correctional Institutions*, 124 AMER. J. PSYCHIAT. 1164, 1166 (1968). "IQ" is the abbreviation for "Intelligence Quotient" and is obtained by use of standards typified by the Stanford-Binet and Wechsler-Bellvue tests. Verbal, mathematical, motor-visual activities, and other skills are measured; the actual performance (mental age) is compared to expected performance (chronological age); and this score is the IQ. Average (normal) is considered 90 to 110.

[3] Cytryn and Lourie, *Mental Retardation, in Comprehensive Textbook of Psychiatry* 820 (Freedman and Kaplan eds. 1967).

[4] REPORT OF THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

[5] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS 14 (2d ed. 1968).

[6] *Id.*

done to remove or cure the cause of the condition once it is present. The "effect" is the important aspect of mental retardation, because it can be modified through proper training and treatment.

"Idiot," "imbecile," and "moron" labels are no longer used; "mild," "moderate," "severe" and "profound mental retardation" as described above are now the accepted descriptive terms. The American Psychiatric Association emphasizes that:

> [t]he Intelligence Quotient should not be the only criterion used in making a diagnosis of mental retardation or in evaluating its severity. It should serve only to help in *making a clinical judgment of the patient's adaptive behavioral capacity.* This judgment should also be based on an evaluation of the patient's developmental history and present functioning, including academic and vocational achievement, motor skills, and social and emotional maturity.[7]

This emphasis clearly underscores the importance, not of the defendant's diagnosis, condition, or IQ, but rather, of his capacity to control his behavior under the circumstances of the act.

Since mental retardation is a chronic process originating early in life, it interferes with a person's acquisition of knowledge. One of the most important kinds of knowledge is that related to moral concepts and social standards. If the person has difficulty learning, as we know the mentally retarded person does, he will have great difficulty acquiring the information necessary to provide a sound basis upon which to make judgments about right and wrong. This is not to say that he cannot learn right and wrong as fact; rather, he finds it difficult to generalize or form abstract concepts and to apply the information to specific situations. In addition, stress of any sort may further reduce his capacity to judge the social appropriateness of his actions.

Similar comments can be made about personality development. The mentally retarded person runs a very high risk of psychotic illness and other types of psychiatric disturbance. An unstable personality would further reduce the retarded person's capacity to control his behavior and make reasoned, cautious decisions about his behavior.

The *M'Naghten* Rule evolved from a need to react to the issue of criminal responsibility of the mentally ill. It is not a valid test of the retarded person's capacity to be legally responsible. Any attempt to consider mental retardation within the framework of the *M'Naghten* test raises two questions: (a) Is mental retardation a disease? and (b) How will mental retardation affect a person's knowledge of the

[7] *Id.*

nature and quality of an act and his knowledge of the wrongfulness of his act?[8] The inadequacy of the *M'Naghten* Rule is clear, for first, mental retardation is not a disease as is assumed under the *M'Naghten* test for mental illness, and second, mental retardation does not necessarily interfere with knowledge of right and wrong, but may significantly impair the ability to generalize and apply this knowledge to a specific action.

The failure of the courts to recognize mental retardation as a condition that qualifies as a disease under the terms of the *M'Naghten* Rule has resulted in the courts excluding it as a basis for defense. The case of *State v. Schlaps* illustrates this. The court stated:

> Protection is always afforded in courts of law to persons of unsound mind. Distinction is made between sanity and insanity in people, but not as respects their grade of intelligence. The law does not attempt to measure degrees of intellect, nor to make a distinction with respect thereto, where the power of thought and reason exists.[9]

As recently as 1961, the Arkansas court restricted the meaning of the term "disease" to "psychosis," thereby rejecting the acceptability of mental retardation as a defense.[10] Thus, the courts recognize insanity or lunacy as a defense, but hold that "weakness of mind" is no excuse! When mental retardation has been raised as a defense, the issue has been clouded by the inapplicability of the *M'Naghten* Rule to the mentally retarded person's knowledge of the nature and quality of his act. The courts have held that "[s]ubnormal mentality is not a defense to crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question."[11] The defendant is required to prove that he was unable to make this distinction at the time he committed the act. Under the best of circumstances (even in the case of severe psychosis), it is difficult, if not impossible, to prove this negative proposition.

Recent rulings in cases where mental illness is the defense have tended to view the criminal behavior as a result of "mental defect or deficiency" which may reduce the person's ability to control his behavior. The criteria utilized to attempt to determine the extent to

[8] Pieski, *Subnormal Mentality as a Defense in the Criminal Law*, 15 VAND. L. REV. 769 (1962).

[9] 78 Mont. 560, 578, 254 P. 857, 863 (1927).

[10] Stewart v. State, 233 Ark. 458, 345 S.W.2d 472 (1961).

[11] Washington v. State, 165 Neb. 275, 278, 85 N.W.2d 509, 511 (1926).

which behavior is a product of mental disease or deficiency are incorporated in a part of *Durham v. United States*[12] and in the *Model Penal Code*.[13]

The *M'Naghten* Rule defines responsibility in terms of intellectual appreciation of the act and its consequences. It is likely, unless the person is severely or profoundly retarded, that he will have the capacity to understand the nature and consequences of his act and will be unable to establish a defense of insanity or altered responsibility under the *M'Naghten* Rule. Indeed, he is not psychotic or acting under delusions, but rather it is his lack of appreciation for the subtleties of social interaction and abstract concepts of right and wrong that impair his behavior.

Recent attempts to modify the *M'Naghten* Rule attest to the dissatisfaction of the courts and of legal and psychiatric experts. It has been criticized because of alleged inhumanity: "It practically holds a man confessed to be insane accountable for the exercise of the reason, judgment and controlling mental power that is required of a man in perfect health."[14] Other critics have charged the criterion is too limited, claiming it only assesses cognitive factors and ignores other aspects of the person that may have contributed to the act. Further, it establishes a rigid dichotomy between sickness and health which ignores the borderline cases. Behavior is rarely so clear-cut. The rule is exclusively a limited test of responsibility which forces categorization of the person's behavior so that the court may discharge its duty regarding punishment. It does not operate to help the defendant obtain treatment for a disability which, if not corrected, may pose a potential danger to society when the prison term has been served.

Modifications have been developed and are typified by the New Hampshire procedure,[15] the *Durham* decision, the English Homicide Act of 1957,[16] and the *Model Penal Code* of this country. Primarily these modifications act to reduce or remove responsibility if the act arises out of or is a product of a mental disease or defect. Additionally,

[12] 214 F.2d 862, 875, 45 A.L.R.2d 1430 (D.C. Cir. 1954).

[13] MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962). *See supra* note 4, at 126, 142.

[14] State v. Jones, 50 N.H. 369, 387 (1871).

[15] *See* Overholser, *Major Principles of Forensic Psychiatry,* in 2 THE AMERICAN HANDBOOK OF PSYCHIATRY 1893 (Arieti ed. 1959).

[16] 5 & 6 Eliz. 2, c. 2, §§ 1-15, at 15 (1957).

their emphasis is to allow the jury to decide if a relationship exists between the mental state and the act and, if so, to what extent it should modify the court's action. These changes provide for recognition of the individual and his life predicament, considering the question of mental illness as fact rather than as a function of a procedural rule.

The court has at least three areas of responsibility in regard to any criminal act: (1) Did the person commit the act? (2) Was he legally responsible? (3) What is the appropriate social response (disposition)? Numerous solutions have been suggested to the dilemma posed by the mentally retarded person's behavior. Modifications have been suggested which relate to each of these three areas of the court's domain.

Partial responsibility: This approach argues basically that the mentally retarded person may not have sufficient intellect to formulate an effective plan—that is, he cannot commit a premeditated crime and, consequently, cannot face certain charges. For example, he may be charged with manslaughter rather than first-degree murder. This notion tends to break down in application, however, as evidenced by the case of *Commonwealth v. Stewart*[17] in which the jury was instructed that subnormal mentality would be a defense only if the defendant did not thereby have sufficient mental capacity to entertain an evil intent for killing. The jury decided the defendant did have the requisite mental capacity, and the court rejected the defendant's plea to use the mere fact of mental retardation as a defense on the following grounds:

> Criminal responsibility does not depend upon the mental age of the defendant, nor upon the question whether the mind of the prisoner is above or below that of the ideal, or of the average, or of the normal man, but upon the question whether the defendant knows the difference between right and wrong, can understand the relation which he bears to others and which others bear to him, and has knowledge of the nature of his act so as to be able to perceive its true character and consequences to himself and to others.[18]

This approach has many drawbacks. It would be difficult to assign a percentage of responsibility or to uniformly place the person in the "right" category of charge. Furthermore, the only outcome must still be that of guilt or innocence in terms of the act, and the social response is limited to one of reduced sentence in prison, not treatment or training. In any event, the mentally retarded person is still labeled as a criminal and sent to prison.

[17] 255 Mass. 9, 151 N.E. 74 (1926).

[18] *Id.* at 13, 151 N.E. at 74-75.

Another variation of the reduced responsibility approach would be to use the person's mental age as a criterion for criminal responsibility. This is a tempting idea which has been tried in some jurisdictions. It works on the basis that if, on the appropriate tests, the person has a mental age of twelve and the laws of that state do not hold a twelve year-old criminally responsible, then the person is found not guilty or is referred to a juvenile court. Although this may respond more to the person as an individual and his capacity, it has some shortcomings. Measurement of mental age cannot be completely accurate, and, since it depends heavily on intellectual achievement, it takes very little account of social judgment and those other qualities that may contribute to a person's behavior. In addition, once a person is declared a minor and, perhaps, a ward of the court, this stigma may remain with him for the rest of his life.

Mitigated punishment: This approach, like the preceding one, reacts only to a part of the problem facing the court—that of the social response. It also allows the person to be labeled criminal; however, it is slightly more acceptable than the reduced responsibility concept *if* the court has sufficient latitude in determining response. For example, if the court can send the person to a school for the mentally retarded rather than just reducing the sentence, it would seem more desirable. Still, the person is found guilty of the act without official recognition of that mental state which was significant to its commission. Also, the possibility of a prison sentence remains, which, even if it is five rather than ten years, is far from just. One may deduce from the reduced punishment that the person also has a reduced responsibility, but this assumption may never be made explicit.

Separation of the fact of commission of the act from the responsibility/response issues: The George Washington study found that no pretrial psychological or psychiatric examinations were made in seventy-eight per cent of the cases studied, and such examinations were never ordered during trial. Also, no presentence study was made in eighty per cent of the cases, and, where such studies were undertaken, they did not include psychiatric or psychometric examinations.[19] This alternative suggests that the courts first determine whether the person committed the act. Once this question has been resolved, a second hearing

[19] *Supra* note 2, at 1168.

or trial, utilizing expert testimony, would be convened to assess the issue of criminal responsibility and social response. This would make maximum use of experts and allow a balanced response considering the needs of the community, the court, and the individual. Nevertheless, it is a clear departure from the traditional legal approach which dictates that the fact of commission and responsibility be judged simultaneously. Unfortunately, it would place a burden on the courts and the various professional groups concerned that could probably not be discharged, but it may ultimately be the best of the several suggestions if it can be made workable and made to fit into the legal machinery.

Another approach is reflected in the report of the Texas Law Task Force of the Governor's Commission on Mental Retardation[20] which suggests that, in those cases where it is intended that evidence of mental retardation in the accused be offered, either during the trial or after the verdict (but prior to sentencing), the defense counsel should be uniformly encouraged to file a motion for probation before the trial commences. In this situation, a pretrial judgment can be made, leading to an assessment of responsibility and a formulation of social response without entering into the question of fact. This allows the court great latitude in dealing with the accused and, hopefully, would lead to an appropriate solution such as sending the person to a school for the retarded. The disadvantage is that a social act may result in confinement without due process. Many people may object that a person should not be forced to accept treatment of any sort without his informed consent or due process.

Although separating the question of whether or not the person committed the act from the responsibility/response issues seems to offer the most reasonable approach, further study must be given the matter. Just as the *Model Penal Code* gives an authoritative and enlightened guide for the defense of criminal acts arising from mental illness, so must an authoritative statement be enunciated regarding mental retardation. Foremost is the need to introduce the concept of mental retardation to the courts and to clearly differentiate it from mental illness. To do so without developing adequate legal procedures for response to the problem might court disaster by generating acquittals without a

[20] GOVERNOR'S INTERAGENCY COMMITTEE ON MENTAL RETARDATION PLANNING AND GOVERNOR'S ADVISORY COMMITTEE ON MENTAL RETARDATION PLANNING, EXCERPTS AND RECOMMENDATIONS FROM THE TEXAS PLAN TO COMBAT MENTAL RETARDATION 27 (1966).

mechanism for securing protection for society and rehabilitation and treatment for the retarded.

Study must be devoted to a comprehensive mechanism—relevant to determination of criminal responsibility and social response—so that mental retardation will be separated from mental illness and so that the response will be directly related to those characteristics unique to the retarded. This determination must be made by an appropriate group of experts and should be accorded the prestige which the *Model Penal Code* has for mental illness.

The difficulties of dealing with mental retardation must be recognized in determining the proper response. The person who is mentally retarded has a fixed, chronic condition which cannot be "cured" as a disease can. He will not just "grow up" intellectually—that is, the twenty-four year old person with a mental age of twelve will not progress to an adult mental capacity by age forty. This is not, however, an untreatable or unmanageable condition. The behavior of the mentally retarded can often be modified by education or training. A complete return to normal or a significant change in IQ is not expected, but appropriate treatment can produce changes in behavior.

The retarded person who commits a criminal act on one occasion may very well do so on another if no restitutive intervention has occurred. Indeed, the George Washington study found that the retarded prisoners studied averaged 3.9 adult criminal convictions for serious acts, typified by the fact that thirty-eight per cent of their cases were criminal homicides. The retardates have spent an average of seven years in incarceration since age sixteen or an average of forty-one per cent of adult life in prison. It is estimated that as many as 16,000 mentally retarded adults are incarcerated in correctional institutions.[21]

Despite these rather dismal statistics, the mentally retarded person does have the potential for rehabilitation. It may be argued that it is no worse to put him in a penitentiary than in a mental hospital or special school if he is going to remain there the rest of his life. With the state of treatment as it is today, this may be true. Staffing patterns are poor in many state hospitals; schools for the retarded and treatment approaches frequently leave much to be desired. Still, it is unacceptable, both on moral and medical grounds, to assign the mentally

[21] *Supra* note 2, at 1166.

retarded to the penitentiary. Of the penal institutions responding in the George Washington study, sixty per cent did not have specialized treatment programs for retardates and ninety per cent did not segregate the retarded inmates.[22] At least the school for the retarded or the mental hospital has the intent of treatment and rehabilitation, providing some hope for improved social behavior. It should be emphasized that though the mental retardate is not curable in the usual medical sense, he is capable of being trained, educated, and placed in an environment that will maximize the capacity for behavioral control.

The growing public interest and efforts to cope with the problems of mental retardation stress the urgency of this issue. More and more the trend is not for the retardate to be removed from his home and sent to a training school; rather, it is to develop community-based resources to maintain him within a familiar social setting, with a job, family, and friends. This places an added strain on community legal resources, because every effort must be made to minimize the risk of criminal behavior and to establish appropriate mechanisms of response to avoid the shame of criminal life for the retarded. If the retardate is to remain in the community where opportunity is greatest, he must be protected from involvement in criminal activity, and the community must receive sufficient protection while the courts discharge their responsibility.

The problem of criminal responsibility in the mentally retarded is a complex issue which is not being adequately handled at this time. We would strongly encourage the courts and the legal profession to address themselves to this problem. We would encourage review of legal procedures in the light of the substantial number of mentally retarded persons who succumb to criminal behavior and in the light of available and emerging community resources for them. We would urge a search for a mechanism that will more appropriately defend the mentally retarded while protecting the community and discharging the court's responsibility. Finally, we would suggest that resolution of this problem will require concerted effort and study by the American Bar Association taking into consideration the knowledge and findings of medical and behavioral sciences regarding mental retardation.

[22] *Supra* note 2, at 1167.